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IN THE SUPREME COURT OF THE UNITED STATES

October 1998 Term

CHARLES J. GREENE, Petitioner v. CITY OF MONTGOMERY Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

# PETITION FOR WRIT OF CERTIORARI

June 17, 1999

Charles J. Greene, Petitioner
1274 Adell Street
Prattville, Alabama 36066
Phone: (334) 365-5197

4018

## QUESTIONS PRESENTED

(1) Whether fraud (in the form of a falsified audio tape recording of court proceedings, along with a correspondingly fraudulent written transcript) in the preparation of the state appellate record and denial of any state evidentiary hearing, for the purpose of discovering and remedying said appellate record deficiencies, violate petitioner's right, under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, to adequate effective and meaningful appellate review in his state appeal as of right?

(2) Whether trial defense counsel's failure to object (to a court official's unauthorized entry and stay in the jury room during deliberations) and counsel's subsequent failure (by refusing to confer with petitioner for the purpose of developing the facts surrounding the jury room incident) to aid petitioner in preparing a new trial motion addressing said jury interference, constitute a denial of petitioner's right to the reasonably effective assistance of counsel, under the Sixth Amendment to the Constitution of the United States, and under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

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IN THE SUPREME COURT OF THE UNITED STATES
October 1998 Term

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CHARLES J. GREENE, Petitioner
v.
CITY OF MONTGOMERY, Respondent

---

# PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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The petitioner Charles J. Greene respectfully prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Alabama, entered on September 11, 1998, discretionary review of which judgment was denied by the Supreme Court of Alabama on March 19, 1999.

## OPINIONS BELOW

The memorandum opinion of the Court of Criminal Appeals of Alabama has not been reported, but it is reprinted in the appendix hereto, page A1; the unreported order of the trial court is also reprinted in the appendix hereto, page B1.

The order of the Court of Criminal Appeals of Alabama respecting rehearing is likewise unreported, but is also reprinted in the appendix hereto, page C1.

The order of the Supreme Court of Alabama, denying discretionary review of the judgment, has not been reported; it is reprinted in the appendix hereto, page D1.

## JURISDICTION

Pursuant to Rule 32, Alabama Rules of Criminal Procedure, petitioner filed a petition for post-conviction relief in the Circuit Court for Montgomery County, Alabama, Said petition specially set up and claimed the following rights, privileges, and immunities under the following indicated provisions of the Constitution of the United States: (a) the right to be informed of the nature and cause of the accusation (including all requisite

elements thereof) against him, under Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; (b) the right to the reasonably effective assistance of counsel, under the Sixth Amendment to the Constitution of the United States, and under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; (c) the right to access to the courts for adequate, effective, and meaningful appellate review in an appeal as of right, claimed under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and also claimed under the Right to Petition Clause of the First Amendment to the Constitution of the United States; (d) the rights to speedy trial, confrontation of hostile witnesses, access to courts in an appeal as of right, due process in appellate to record settlement proceedings, and due process as to provision of an appellate transcript suitable for adequate, effective, meaningful appellate review of conviction—all of which rights are claimed under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and also claimed under the Sixth Amendment to the Constitution of the United States.

Petitioner timely initiated the abovementioned post-conviction proceedings on Monday, April 20, 1998; the Circuit Court of Montgomery County, Alabama denied said post-conviction relief, without a hearing, in an order entered on May 5, 1998. On June 12, 1998, petitioner filed a Motion for Reconsideration in the Circuit Court, wherein he specially set up and claimed the denial of his due process right to an evidentiary hearing (on his post-conviction allegations) under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; the Circuit Court denied said motion on June 17, 1998.

Petitioner then took an appeal to the Court of Criminal Appeals of Alabama, reasserting the aforementioned rights and federal constitutional provisions. The Court of Criminal Appeals affirmed the trial court judgment on September 11, 1998, and overruled an application for rehearing on October 23, 1998, involving the same rights and provisions.

The petitioner then sought discretionary review of the decision of the Court of Criminal Appeals of Alabama, by reasserting the abovementioned federal rights and federal constitutional provisions in the Supreme Court of Alabama. The

Supreme Court of Alabama denied discretionary review on March 19, 1999.

The jurisdiction of this Court to review the September 11, 1998, decision, of the Court of Criminal Appeals of Alabama, is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment 6:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . . and to have the Assistance of Counsel for his defence."

Constitution of the United States, Amendment 14, Sec. 1:

> ". . . . nor shall any State deprive any person of life, liberty, or property, without due process of law;"

## STATEMENT OF THE CASE

The proceedings giving rise to this petition were initiated on Monday, April 20, 1998, in the Circuit Court for Montgomery County, Alabama; petitioner began an action, under Rule 32, Alabama Rules of Criminal Procedure, for relief from a previous conviction, on the grounds of violation of his federal constitutional due process right to the reasonably effective assistance of counsel, his right to an appellate record sufficient for adequate, effective, and meaningful appellate review in his previous state appeal as of right, and his right to be free from fraud in the preparation of the state appellate record and to an opportunity for an evidentiary hearing in which to expose and remedy such fraud. The facts giving rise to these contentions, summarized below, were set out in the Grounds section of the Rule 32 petition filed in the trial court; said portion of the Rule 32 petition is reprinted in the appendix hereto as item "E", and is located in the record at pages C.6 through C.10.

The Rule 32 petition specially sets up and claims the right to the effective assistance of counsel under the Sixth Amendment to the Constitution of the United States and under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; the Rule 32 petition sets out that trial defense counsel failed to object or move for mistrial on account of a court official's unauthorized entry and five-to-ten minute stay in the jury room during deliberations, and that counsel further failed, after trial, to respond to petitioner's reasonable and repeated requests for information relative to the jury room intrusion. The Rule 32 petition sets out that petitioner was prejudiced by counsel's actions because the initial appeal, on the basis of the court official's actions (which are presumptively prejudicial under state practice, if preserved for review) was denied on the basis of counsel's failure to preserve the issue for appellate review; further, because defense counsel refused to confer with petitioner prior to the filing of the new trial motion, petitioner was unfairly surprised by said counsel's assertion that she took no objection, and this made it impossible for petitioner to assert the ineffectiveness of counsel claim in the new trial motion. See appendix, document "E", item (2), and pages C.7-C.8 of the appellate record in the instant case.

The Rule 32 petition filed in the trial court also specially sets up and claims the due process right of access to the courts for adequate, effective, and meaningful appellate review in his appeal as of right, invoking the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The essential facts underlying this claim are set out in the Rule 32 petition [reprinted in the appendix hereto as document "E", items (3) and (4), and located in the appellate record at pages C.8 through C.10] and can be summarized as follows: The petitioner's efforts to pursue his legal claims on his original appeal were substantially hindered by a falsified transcript, the denial of any evidentiary hearing on petitioner's claims concerning said falsified transcript, the falsification of an audio tape recording of trial court proceedings, the presentation of said falsified audio tape to petitioner as a means of thwarting his efforts to correct the record, and the denial of any evidentiary hearing at which to expose such audio tape falsification. The Rule 32 petition also asserts the specific legal claims which were hindered on the original appeal, including denial of confrontation of prosecution witnesses who filed false affidavits (which were not shown to petitioner until well

after the hearing at which they were introduced), and including denial of confrontation of the prosecutor regarding false grounds asserted in a motion for continuance of the original trial (which also implicates speedy trial rights). See Appendix, document "E", items (3) and (4) and pages C.8 through C.10 of the appellate record in the instant case. The Rule 32 petition also asserts specifically that the aforesaid audio tape has been edited and altered so as to prevent discovery and proof of appellate transcript inaccuracies.

The City of Montgomery's Response to the Rule 32 petition [reprinted in the appendix hereto as document "F", and located in the appellate record at pages C.14 through C.16] failed to refute any of the factual allegations of the Rule 32 petition, and instead inadequately pleaded preclusion grounds. The petitioner's Reply (located in the appellate record at pages C.17 through C.24) pointed out that the City failed to meet its legal burden of properly pleading preclusion grounds, invoked the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States [as construed by the state appellate courts in the cases of *Smith v. Smith*, 607 So.2d 311 (Ala.Cr.App. 1992) and *Ex parte Rice*, 565 So.2d 606 (Ala. 1990)], and asserted that the case should proceed to a hearing.

The trial court denied the Rule 32 petition without a hearing (the judgment order is reprinted in the Appendix hereto as document "B", and is located in the appellate record at pages C.25 through C.27), essentially tracking the language of the City's Response, lumping together mutually exclusive preclusion grounds, contrary to settled state practice that assertion of preclusion in such a manner is legally ineffective.

The petitioner promptly filed a motion for reconsideration, requesting that the trial court proceed to a hearing, asserting that the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States was violated by the court's preclusion of the Rule 32 claims without first providing the opportunity for a hearing; the petitioner's Motion for Reconsideration is reprinted herein as document "G", and is located in the appellate record at pages C.28 through C.34. The trial court denied this motion without comment (appellate record, page C.28).

The petitioner then took an appeal to the Court of Criminal Appeals of Alabama, reasserting the questions of ineffective counsel, falsified appellate record, and denial of a hearing, invoking the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States as to each of these questions and claims, and specially setting up and claiming, under said constitutional provisions, his rights to the reasonably effective assistance of counsel, to an appellate record adequate for meaningful review, and to an evidentiary hearing on his claims; the portion of the appellate pleadings wherein these claims are asserted is reprinted in the Appendix hereto as document "H".

On September 11, 1998, the Court of Criminal Appeals of Alabama affirmed the trial court judgment; this decision, reprinted in the Appendix hereto as document "A", is the one now under review in this Court. Petitioner then filed an application for rehearing in the Court of Criminal Appeals of Alabama, again reasserting the issues, rights, and federal constitutional provisions noted in the preceding paragraph hereinabove; the petitioner's assertions in his rehearing pleadings are reprinted in the Appendix hereto as document "I". On October 23, 1998, the Court of Criminal Appeals of Alabama overruled the application for rehearing without comment; the appellate rehearing order is reprinted in the Appendix hereto as document "C".

The petitioner then sought, on November 6, 1998, discretionary review of the state appellate court decision in the Supreme Court of Alabama, again reasserting the issues of ineffective counsel, falsified appellate record, and denial of a hearing, invoking the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States as to each of these issues and again specially setting up and claiming, under said constitutional provisions, his rights the reasonably effective assistance of counsel, to an appellate record adequate for meaningful review, and to an evidentiary hearing on his claims. The portion of the Alabama Supreme Court Petition wherein these claims are reasserted is reprinted in the Appendix hereto as document "K"; as to each claim, conflict with prior decisions, of the Supreme Court of the United States, is specifically noted. That portion of the supporting brief, wherein each of the above rights and federal constitutional provisions was presented as an issue in the Alabama Supreme Court, is also reprinted in the Appendix hereto as document "J".

On March 19, 1999, the Supreme Court of Alabama denied, without opinion, the petitioner's request for discretionary review of the decision of the Court of Criminal Appeals of Alabama; that order of the Supreme Court of Alabama is reprinted in the Appendix hereto as document "D".

On June 17, 1999, the instant petition was filed in this Court to obtain discretionary review of the decision Appendix, document "A") of the Court of Criminal Appeals of Alabama affirming the trial court judgment (Appendix, document "B").

## REASONS FOR GRANTING THE WRIT

**I. The Court of Criminal Appeals' decision, affirming the trial courts' denial of petitioner's claims, of fraudulent preparation of appellate record materials (i.e., audio tape recording and transcript) and deprivation of any opportunity for an evidentiary hearing for discovering and remedying such fraudulent preparation, is in conflict with prior decisions of this court on the same points of law.**

In *Chessman v. Teets*, 350 U.S. 3 (1955) this Court held that fraud in the preparation of the appellate record constitutes a denial of due process under the Fourteenth Amendment. The instant petitioner's unrefuted allegations in his trial court petition claim similar fraud in the preparation of the record in his original appeal; the Court of Criminal Appeals' decision affirming the denial of that claim is in direct conflict with the above decision of this Court. The instant petitioner also made another unrefuted claim, of denial of any evidentiary hearing concerning such fraud; the Court of Criminal Appeals affirmed the trial court's denial of this claim. The decision on the hearing claim is in conflict with another decision of this Court, *Chessman v. Teets*, 354 U.S. 156, 164 (1956), in which this Court reversed the decision denying an evidentiary hearing on a fraudulent record claim as violative of due process.

Such conflicts with this Court's prior decisions present a strong, valid reason for granting the writ; see, for example, *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 371-372 (1974).

**II. The Court of Criminal Appeals' decision, affirming the trial court's denial of petitioner's claim of deprivation of his right to the reasonably effective assistance of counsel, is in conflict with prior decisions of this Court on the same point of law.**

In the case of *Strickland v. Washington*, 466 U.S. 668, 686 (1984), this Court announced that the Sixth Amendment right to counsel (made obligatory upon the states by the Due Process Clause of the Fourteenth Amendment) should be evaluated under the standard of whether counsel's deficient conduct had the effect of rendering the resultant judgment unreliable; that decision, *Id.*, at 688, also defines consultation and communication to be basic duties that counsel owes defendant. The unrefuted allegations of the trial court petition indicate that trial defense counsel failed to object to the court official's unauthorized entry and stay in the jury room during deliberations, and subsequently failed to confer with petitioner concerning said events (Appendix, document "E"; appellate record pages C.7-C.8); under state practice, such an unauthorized entry is presumptively prejudicial, *Brickley v. State*, 243 So.2d 502 (Ala. 1970), and when counsel neglects to challenge such actions, the resulting judgment must be viewed as being at least presumptively unreliable. Defense counsel's subsequent failure to confer with petitioner during his preparation of the new trial motion violates another basic duty, to consult with a client, under the *Strickland* standard. The affirmance by the Court of Criminal Appeals under the above circumstances is in conflict with the *Strickland* standards and calls for review of said decision by this Court upon a writ of certiorari.

**III. The Court of Criminal Appeals' decision ostensibly rests on two untenable state grounds which are inadequate, under state law and precedent, to support that decision; these state grounds (preclusion and limitations period bars) are so without fair or substantial support that they must be considered a mere device for avoidance of a decision on the federal constitutional questions raised by petitioner.**

It is settled law that jurisdiction of this Court cannot be defeated by a state court's assertion of non-federal grounds which are without fair or substantial support, *Wolfe v. North Carolina*, 364 U.S. 177, 185 (1960). This Court examines state decisions to determine the adequacy of the asserted state ground to support the judgment, *Texas v. Brown*, 460 U.S. 730, 632n.2 (1983); *NAACP v. Alabama*, 357 U.S. 449, 454-456 (1958). Examination of state law and precedents shows that the asserted state grounds of decision are plainly untenable in the instant case and incapable of supporting the judgment of the Court of Criminal Appeals.

One of the state grounds asserted is the limitations bar of Rule 32.2(c), Ala. R.Cr.Proc., which provides that Rule 32 petitions must be filed within two years of the issuance of the certificate of judgment in the underlying original appeal, which in the instant case was issued on April 19, 1996 (appellate record, page C.4). The Rule 32 petition in the instant case was filed on Monday, April 20, 1998 (appellate record, pages C.2, C.12); from this it can be deduced that the two-year anniversary (of the issuance of the certificate of judgment) fell on a Sunday, April 19, 1998. Under these circumstances, the provisions of § 1-1-4, Code of Ala., 1975, are made operative; this statute (reprinted in the Appendix hereto as document "M") provides that all legal limitations periods ending on a Sunday, are carried over to the following Monday to allow timely filing on that day; the statute allowed timely filing of the Rule 32 petition on April 20, 1998, which was specifically pointed out to the Court of Criminal Appeals by petitioner in his appellate brief (Appendix, document "I"). The Alabama Supreme Court has construed these statutory provisions to allow such a timely Monday filing, *Timberlake v. Grand Lodge*, 99 So.2d 429, 430 (Ala. 1957). The Court of Criminal Appeals assertion of limitations bars is thus contrary to state statutes, and decisions of the Alabama Supreme Court, and cannot be adequate as a state ground of decision.

The second state ground asserted by the Court of Criminal Appeals is preclusion under Rule 32.2(a), Ala.R.Cr.Proc. (reprinted in the Appendix hereto as document "L"). This issue was first asserted by the City in the trial court, in the Response to the petitioner's Rule 32 petition) Appendix "F"; appellate record, C.14 to C.16); the City simply lumped together four mutually exclusive preclusion provisions without specifying which particular one it relied on, and the trial court adopted this

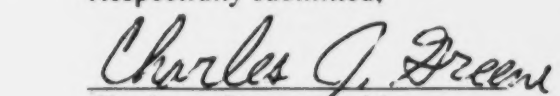
confusing and inadequate pleading nearly verbatim in its judgment order (Appendix "B", record C.25-C.27). The City failed to meet its burden of pleading preclusion because the lumping together of the mutually exclusive provisions of Rule 32.2(a)(2) through (5) failed to provide petitioner with the type of notice necessary to satisfy due process, *Hughley v. State*, 597 So.2d 764 (Ala.Cr.App., 1992); an appellate court affirmance of such inadequate preclusion assertions in reversible error, *Ex parte Rice*, 565 So.2d 606, 608 (Ala. 1990), and violative of petitioner's rights under the Due Process Clause of the United States Constitution, *Id.*, 607-608. See also *Smith v. State*, 607 So.2d 311, 313 (Ala.Cr.App. 1992). The petitioner asserted the above contentions in the trial court (record C.17 to C.18), in the appellate court (Appendices "H" and "I"), and in the Alabama Supreme Court (Appendix "J").

The above-cited state precedents show that the preclusion grounds are inadequate to support the state decisions and are not sufficient to allow the evasion of the federal constitutional claims asserted by petitioner. *Wolfe v. North Carolina*, 364 U.S. 177, 185 (1960). The Court thus has jurisdiction for review of the petitioner's federal claims.

## CONCLUSION

The decision of the Court of Criminal Appeals on petitioner's claims, of ineffective assistance of counsel, and of fraudulent preparation of the original underlying state appellate record, is in conflict with prior decisions of this Court on those points of law. The state decision is not based upon any independent or adequate state grounds; therefore, this Court has jurisdiction to grant the writ, and to review and revise the judgment of the Court of Criminal Appeals of Alabama, and the petitioner respectfully requests such relief.

Respectfully submitted,



Charles J. Greene, petitioner
1274 Adell Street
Prattville, Alabama 36066
(334) 365-5197

June 17, 1999

## APPENDICES


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Court of Criminal Appeals
State of Alabama
[Stamped - Released September 11, 1998]

MEMORANDUM

CR-97-1841 Montgomery Circuit Court CC-90-5109.60

*Charles J. Greene v. City of Montgomery*

AFFIRMED BY MEMORANDUM.

The appellant was convicted of trespassing in the third degree and received a $150 fine. The appellant's conviction and sentence were affirmed by this Court on June 26, 1992, but was remanded by the Alabama Supreme Court for supplementing the record thereafter. On return to remand, this Court again affirmed the conviction and sentence. The appellant's Rule 32 petition reveals that a number of other appeals and writs have been filed by him with the Alabama Supreme Court, United States District Court, the Eleventh Circuit Court of Appeals, and the United States Supreme Court.

In this Rule 32 petition, the appellant argues that his indictment failed to adequately inform him of the nature of the charges against him by omitting a requisite element, that his trial counsel was ineffective for a number of grounds, and that he was denied due process of law due to the improper actions of the court reporter, the trial court, and the Alabama Court of Criminal Appeals. As to this first claim raised by the appellant, which ostensibly raises a jurisdictional matter, the appellant's actual claim is that his indictment was defective in that it failed to indicate that he was told not to enter by an authorized person. However, as noted by the State in its response and by the trial court in its order denying the Rule 32 petition, the "authorized person" language is not a requisite element of the offense of criminal trespass in the third degree pursuant to §13A-7-4 Ala. Code 1975, which charges that "[a] person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in or upon premises." The language concerning an "authorized person" in this context refers to the definition of the requisite element "enter or remain unlawfully" which element is contained in this offense. See §13A-7-1(4).

Therefore, because the appellant's arguments could have been raised at trial or on direct appeal, they are precluded.

Moreover, the record indicates that this petition was filed outside the two-year limitations period established by Rule 32(c), Ala.R.Crim.P. As the claims raised by the appellant were clearly precluded, the trial court properly summarily denied the appellant's Rule 32 petition.

Long, P.J., and Cobb and Brown, JJ., concur; Baschab, J., concurs in result only without opinion.

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA
*GREENE v. CITY OF MONTGOMERY*
Case No. CC-90-5109.60GR

ORDER ON DEFENDANT'S RULE 32 PETITION

This cause is before this Court on the Defendant's A.R.Crim.P. Rule 32 petition. After careful review of said petition and the City of Montgomery's response to said petition, it hereby ORDERED, DECREED and ADJUDGED that this petition is due to be denied, for the following reasons:

(1) The Defendant's assertion that he was not adequately informed of the third degree criminal trespass charge against him is without merit. The affidavit and warrant for arrest in this case clearly charged the Defendant pursuant to Alabama Code 13A-7-4:

> "[on] April 3, 1990, within twelve months before making this affidavit and within the City/Town of Montgomery, Alabama, or the police jurisdiction thereof, Charles J. Greene did knowingly enter or remain unlawfully in or upon the premises of Auto Zone, 517 West Fairview Avenue, in violation of Ordinance Number/Section Chapter 1, Section 9 previously duly adopted, effective and in full force at the time the offense was committed. (Ref. 13A-7-4, Code of Alabama, 1975)[.]"
>
> (C. 92.)

This charge is in full compliance with the third degree criminal trespass statute:

> "A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in or upon premises."

The Defendant was given proper notice of the nature of the criminal act of which he was accused, and the charge complied with the Alabama Code statute at issue. Therefore, there is no merit to this issue. Because there is no merit to this issue, this issue is not jurisdictional under A.R.Crim.P. Rule 32.1(b). This issue is therefore procedurally barred from consideration in this

petition for post-conviction relief, because it either was or could have been raised at trial or on direct appeal, pursuant to the provisions of A.R.Crim.P. Rule 32.2(a)(2), (a)(3), (a)(4), and (a)(5).

(2) The Defendant's contentions that he was given ineffective assistance of counsel regarding his attorney's failure to object, move for mistrial, or give him a "recollection of pertinent trial events," are improperly raised in this petition. The Defendant represented himself on appeal. Therefore, the issue of ineffective assistance of counsel is procedurally barred, because it is an issue that either was or could have been raised on direct appeal, pursuant to A.R.Crim.P. Rule 32.2(a)(4) and (a)(5).

(3) The Defendant's contentions that he was denied his right to access to courts due to alleged inaccuracies in the transcription of trial proceedings and alleged error regarding an audio tape of a hearing on a motion for new trial are improperly raised in this petition. The Defendant asserts that this Court, along with the Court of Criminal Appeals, deprived him of adequate review by, among other things, directing him to review the tape while allegedly on file with the Court of Criminal Appeals. This issue is an issue that either was or could have been raised at trial or on direct appeal, pursuant to the provisions of A.R.Crim.P. Rule 32.2(a)(2), (a)(3), (a)(4), and (a)(5).

(4) The Defendant's contentions that he was deprived of his rights to a speedy trial, confrontation of witnesses, access to courts, due process in regard to the audio tape discussed above, and due process in regard to an adequate appellate transcript, are improperly raised in this petition. These claims either were or could have been raised on at trial or on direct appeal, pursuant to the provisions of A.R.Crim.P. Rule 32(a)(2), (a)(3), (a)(4), and (a)(5).

For the foregoing reasons, the Defendant's A.R.Crim.P. Rule 32 petition is hereby DENIED.

DONE this the [5th] day of [May,] 1998.

[/signed/ Sally Greenhaw, Circuit Judge]

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
RE: CR-97-1841
*Charles J. Greene v. City of Montgomery*
(Appeal from Montgomery Circuit Court: CC-90-5109.60)

Dear Sir or Madam:

You are hereby notified that on October 23rd, 1998 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for rehearing overruled. 39(k) Motion Denied.

/signed/ Lane W. Mann
Clerk
Court of Criminal Appeals

IN THE SUPREME COURT OF ALABAMA
March 19, 1999

1980249

Ex parte Charles J. Greene, PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (in re: *Charles J. Greene v. City of Montgomery*) (CR-97-1841) (Montgomery Cir.Ct.No.: CC-90-5109.60)

CERTIFICATE OF JUDGMENT
Writ Denied

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The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied. NO OPINION.

COSTS TAXED TO PETITIONER.

KENNEDY, J. - Hooper, C.J., and Maddox, See, and Johnstone, JJ., concur.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, ALABAMA

POST-CONVICTION PETITION

April 20, 1998

GROUNDS

(1) The Sixth Amendment to the Constitution of the United States, the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and the Constitution of Alabama of 1901, Article I, § 6, require a new trial, or other relief, in as much as defendant was deprived of his right to be informed of the nature and cause of the accusation against him, due to the fact that the complaint failed to charge all the requisite elements of the offense. Since this defect deprived the trial court of jurisdiction to render the judgment of conviction, this ground also arises under 12.B. (R.32 form, A.R.Cr.P.) and Rule 32.1(b), A.R.Cr.P).

The complaint was brought for violation of § 13A-7-4, Code of Alabama, 1975, for trespass, third degree. Since the violation is alleged in the complaint to have occurred in a store open to the public, a requisite element of the offense is that there must be defiance of an order personally communicated by the owner or other authorized person [Code of Alabama, 1975, § 13A-7-1(4)]. The complaint stated only that defendant was "told" not to enter; it omits to include the necessary element that defendant be told by an "authorized person" not to enter. From the complaint, it would be impossible to prove the violation by showing, for example, that another customer told the defendant to leave because of animosity toward the defendant; without authorization to act for the store, the other customer's warning to defendant is legally meaningless.

The complaint as laid in this case does not explicitly state that defendant was told by an <u>authorized person</u>, not to enter or remain; a valid accusation must leave nothing to implication and the failure to state the

requisite element that the warning was given by such "authorized person" makes the complaint defective. Because the complaint in this case is defective, in failing to state all the requisite elements of the offense, it is void and the trial court had no jurisdiction to render judgment thereon.

(2) The Sixth Amendment to the Constitution of the United States, the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and the Constitution of Alabama of 1901, Article I, § 6, require a new trial, or other relief, in as much as the defendant was deprived of the reasonable assistance of counsel due to trial defense counsel's failure to object to, or move for mistrial on account of, the bailiff's entry and five-to-ten minute stay in the jury room during deliberations, and in further failing, after trial, to respond to defendant's reasonable and repeated requests for information regarding said counsel's recollection of the events surrounding the bailiff's intrusion into the jury deliberation process.

Defendant was prejudiced by counsel's ineffectiveness in that his appeal of the conviction, on the grounds of the bailiff's actions, was denied on the basis of counsel's failure to preserve the issue for appellate review. Defendant was further prejudiced in that, due to counsel's failure to respond to requests for information (regarding the bailiff's actions and counsel's actions in response thereto) defendant was unfairly surprised, at the hearing on the motion for new trial, by counsel's assertion that she took no action to remedy the bailiff's acts: consequently, defendant was unable to assert ineffectiveness of counsel in his new trial motion, or at the hearing, because defense counsel refused to provide timely information to defendant concerning her recollection of the pertinent trial events.

(3) The Due Process Clause of the Fourteenth Amendment to Constitution of the United States, the Right to Petition Clause of the First Amendment to the Constitution of the United States, and the due process provisions of the

Constitution of Alabama of 1901, Article I, § 6, require that defendant be granted a new trial, or other relief, in as much as defendant was deprived of his right of access to courts for adequate, effective, and meaningful appellate review in his appeal as of right; specifically, defendant's right of access to courts for presentation of claims on appeal were frustrated by: (a) the failure of the court reporter to accurately and fully report trial court proceedings, (b) the failure to state officials to allow defendant to present the audio tape (of the hearing on the motion for new trial) at an evidentiary hearing for the purpose of showing inaccuracies and omissions in the written transcript, and (c) the action of state officials in isolating defendant's sole means of record correction to an out-of-court review of an audio tape (of the new trial motion hearing) which had been edited and altered to prevent discovery and presentation of specific omissions and inaccuracies in the written transcript of the new trial hearing.

Defendant suffered actual injury in that the actions of the court reporter and other state officials, as noted above, substantially hindered his efforts to pursue on appeal the following legal claims: denial of defendant's confrontation rights (caused by omission from written transcripts of defendant's objections, and stated grounds thereof, regarding the submission of the prosecution's affidavits at the new trial hearing); denial of defendant's right to present witnesses and evidence (omission of defendant's request for continuance so as to permit questioning of Patricia Kelley regarding false grounds of prosecution's motion to continue); denial of right to confrontation (transcript omitted grounds of objection to admission of mileage log of prosecution witness); denial of defendant's right to due process hearing on his motion for new trial caused by judge's subsequent failure to hold further evidentiary hearing agreed upon at initial hearing (transcript omitted exchange between judge, prosecutor, and defendant which indicated that further evidentiary hearing would be allowed); denial of defendant's confrontation rights due to detention, outside

courtroom, of defendant during questioning of prosecution witness (transcript does not indicate events transpiring during this period); all other legal claims which might have been shown had defendant been allowed, as ordered by the trial court, to review an unaltered version of the audio tape of the new trial hearing in order to discover inaccuracies in the written transcript.

The defendant filed a record correction motion in the trial court, asserting the above-mentioned transcript inaccuracies and requesting review of the said audio tape as a means of supplementing the written transcript; the trial court granted this motion, and ordered that audio tape review be allowed. The court reporter failed to allow review of said audio tape, and the audio tape was subsequently transmitted to the appellate court. The court reporter claimed, at a subsequent hearing, that the audio tape transmitted to the appellate court was turned on during the new trial motion hearing, and that the recording had not been altered by addition or deletion; at the same hearing, defendant requested that the audio tape be re-submitted for authentication, by the court reporter, and evidentiary presentation, which request was denied by the trial court. Instead, the trial court, with the concurrence of the clerk of the appellate court, directed defendant to undertake an out-of-court review and inspection of the said audio tape (on file at the appellate court) as his sole means of discovering and presenting inaccuracies and omissions in the written transcript of the hearing on the motion of new trial. The defendant reviewed the audio tape at the appellate court, and made a duplicate of same; the said audio tape shows indications of editing and altering, and had in fact been edited and altered before defendant had an opportunity to review same; further, the audio tape presented to defendant shows indications of a protocol for recording, which is contrary to the protocol the court reporter claims to have followed.

The cumulative effect of the foregoing events is that defendant has been deprived of an appellate transcript (or suitable alternative) sufficient for adequate, effective, and meaningful appellate review of claimed legal errors in the trial court.

(4) The Sixth Amendment to the Constitution of the United States, the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and the Constitution of Alabama of 1901, Article I, § 6, require a new trial, or other relief, in as much as defendant has been deprived of the following rights (by the actions of state officials as indicated): (a) speedy trial (due to the prosecution's motion to continue, based on false grounds, which delayed the trial past a point at which a material defense witness had his employment threatened on account of his anticipated testimony favorable to the defense); (b) confrontation of the witnesses against him (due to the prosecution's failure to serve copies of her response to the motion for new trial, with its accompanying affidavits, upon the defendant prior to the new trial hearing); (c) access to the courts under the due process clause (due to the failure of the court reporter to accurately record, in the written transcript, defendant's objections, and grounds stated therefor, to the response and affidavits—such omission precluding appellate review of error in admission of the affidavits); (d) due process in proceedings for record settlement (due to denial of evidentiary presentation of the audio tape at record correction hearings); (e) due process as to provision of an appellate transcript suitable for adequate, effective, and meaningful appellate review of conviction (due to actions of state officials in directing defendant to review, as his sole means of record correction, an audio tape which had been edited and altered so as to prevent discovery, and proof, of transcript inaccuracies).

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA
*GREENE v. CITY OF MONTGOMERY*
Case No. CC-90-5109.60 GR

RESPONSE TO DEFENDANT'S A.R.CRIM.P.
RULE 32 PETITION
[Record, pages C.14 to C.16]

COMES NOW the City of Montgomery in response to the Defendant's A.R.Crim.P. Rule 32 petition, and respectfully requests that this petition be denied on the following grounds. The Defendant's issues, and the reasons that this Court should deny the Defendant's petition on those issues, are set out below.

(1) The Defendant first maintains the complaint in this case did not adequately inform him of the charge against him. His contention centers around his argument that the complaint, which regarded third degree criminal trespass, did not indicate that an "authorized person" told him not to enter the premises. This issue is meritless, because the affidavit and warrant for arrest in this case clearly charged the following:

> "[on] April 3, 1990, within twelve months before making this affidavit and within the City/Town of Montgomery, Alabama, or the police jurisdiction thereof: Charles J. Greene did knowingly enter or remain unlawfully in or upon the premises of Auto Zone, 517 West Fairview Avenue, in violation of Ordinance Number/Section Chapter 1, Section 9 previously duly adopted, effective and in full force at the time the offense was committed. (Ref. 13A-7-4, Code of Alabama, 1975)[.]"
>
> (C. 92.)

This charge is in full compliance with the third degree criminal trespass statute:

> "A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in or upon premises."

The charge gave proper notice to the Defendant of the nature of the criminal act of which he was accused, and complied with the Alabama Code statute at issue. There is no merit to this issue; thus, this issue is not jurisdictional under A.R.Crim.P. Rule 32.1(b). This issue is therefore procedurally barred from consideration in this petition for post-conviction relief, because it either was or could have been raised at trial or on direct appeal, pursuant to the provisions of A.R.Crim.P. Rule 32.2(a)(2), (a)(3), (a)(4), and (a)(5).

(2) The Defendant next maintains that he was denied effective assistance of counsel, regarding his attorney's failure to object, move for mistrial, or give him a "recollection of pertinent trial events." The Defendant represented himself on appeal. Therefore, the issue of ineffective assistance of counsel is improperly raised in this petition, because it is an issue that either was or could have been raised on direct appeal, pursuant to A.R.Crim.P. Rule 32.2(a)(4) and (a)(5). *Brown v. State*, 681 So.2d 1102 (Ala.Crim.App. 1996).

(3) The Defendant next maintains that his right to access to courts was frustrated by alleged inaccuracies in the transcription of trial proceedings and alleged error regarding an audio tape of a hearing on a motion for new trial. The Defendant asserts that this Court, along with the Court of Criminal Appeals, deprived him of adequate review by, among other things, directing him to review the tape while allegedly on file with the Court of Criminal Appeals. This issue is improperly raised in this petition, because it is an issue that either was or could have been raised on at trial or on direct appeal, pursuant to the provisions of A.R.Crim.P. Rule 32.2(a)(2), (a)(3), (a)(4), and (a)(5).

(4) The Defendant next maintains that he was deprived of his right to a speedy trial, confrontation of witnesses, access to courts, due process in regard to the audio tape discussed above, and due process in regard to an adequate appellate transcript. All of these claims are improperly raised in this petition, as they either were or could have been raised on at trial or on direct appeal, pursuant to the provisions of A.R.Crim.P. Rule 32(a)(2), (a)(3), (a)(4), and (a)(5).

For the foregoing reasons, the Defendant's A.R.Crim.P. Rule 32 petition should be denied.

Respectfully submitted this the 27th day of April, 1998.

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA
*GREENE v. CITY OF MONTGOMERY*
Case No. CC-90-5109.60GR

MOTION FOR RECONSIDERATION
[Record, pages C.28 to C.34]

Comes now the petitioner, Charles J. Greene, and moves the court to reconsider and vacate its ruling, entered in this case on May 5, 1998, denying the petition for post-conviction relief, and as grounds therefore states as follows:

1. As to all grounds asserted in the petition, this court was without any valid grounds upon which to base its finding of preclusion; the respondent did not adequately plead preclusion and wholly omitted to refute any of the factual allegations contained in the petition.

2. Under Rule 32.3, A.R.Cr.P., the burden of pleading preclusion lies with the prosecution and this burden was not met by the respondent; the prosecution's response merely contained general allegations referring the court to Rule 32.2(a)(2) through (5), which are mutually exclusive of, and inconsistent with, each other, to wit; the City claims [citing Rules 32.2(a)(2) and (4)] that each of the petition grounds "<u>was raised</u>" at trial/appeal, and, at the same time, the City further claims [citing Rules 32.2(a)(3) and (5)] that each of the <u>same</u> said grounds "<u>was not raised</u>" at trial/appeal (the quoted words are from the referenced Rules).

3. The court adopted and signed the respondent's preclusion assertions nearly verbatim in making its findings for the order denying, on preclusion grounds, the petition; as it stands, the present order finds that the petition claims were <u>both</u> raised <u>and</u> not raised at trial/appeal, and the court's entry of the judgment order upon such a self-contradictory premise was an abuse of discretion and violated the petitioner's right, under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, to notice and an opportunity to respond to and refute, respondent's preclusion allegations.

4. In regard to the petition ground asserting failure of the complaint to charge all requisite elements of the offense, the court

further abused its discretion by finding preclusion as to an issue arising under Rule 32.1(b) A.R.Cr.P.; the failure to charge an offense is a jurisdictional issue not subject to preclusion unless the prosecution affirmatively shows that such issue was raised or addressed previously, and the City did not even make up its mind whether to assert that this issue "was raised" or "was not raised," much less back up its assertions with citations to the record.

5. The petition alleges that trial counsel failed to object, or move for mistrial on account of, the bailiff's entry into the jury room during deliberations; the petition further alleges that trial counsel refused to provide information regarding these trial events in a timely manner; the petition also alleges that defendant was prejudiced in that his appeal on the basis of the bailiff's actions was denied due to the above-mentioned failure of trial counsel to preserve the issue, by objection, for appellate review. None of these petition allegations were refuted by the respondent, and the court made no findings contradicting these undisputed facts; the court abused its discretion in denying the petition in absence of any presentation of contrary facts by the City, and further abused its discretion in failing to specify any factual basis for denying the petition in the face of the undisputed facts. The court's failure to address the facts on this issue deprives the petitioner of his due process right to appellate review of the facts, in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

6. The petition alleges that the state courts have refused to allow evidentiary presentation of the audio tape of the new trial hearing in record correction proceedings; the petition further alleges that the audio tape presented to defendant was an edited and altered version of the original, actual recording of the new trial hearing, and that presentation of this altered version to defendant (in lieu of the actual, original recording) prevented discovery and assertion of inaccuracies in the written transcript. None of these petition allegations was refuted by the respondent, and the court made no findings contradicting the above undisputed facts; the court abused its discretion in denying the petition in absence of assertion by the City of any facts to the contrary of the petition allegations, and further abused its discretion in failing to specify any factual basis for denial of the petition in the face of the above-mentioned undisputed petition allegations. The court's failure to

make specific findings of fact supporting the denial of the petition makes the judgment order insufficient to properly notify an appellate court of the basis for the trial court decision and the petitioner consequently cannot be afforded due process in the event of an appeal, which is likely to be undertaken after disposal of this motion by the court.

7. The fact allegations of the petition, as hereinabove described, were unrefuted by the prosecution and not addressed in the court's order; under these circumstances, the petitioner is entitled to an evidentiary hearing, and the court abused its discretion in denying the petition without such an evidentiary hearing. An evidentiary hearing is especially appropriate in this case because the allegations of the petition indicate that fraud may have been perpetrated by some state court officials during the course of the appeal of the conviction; such allegations, if proven true, would indicate that the appeal as of right which was purportedly afforded defendant was in fact a mere sham and mockery due to a falsified record; most importantly, since the petitioner has never been afforded an opportunity to review, and present as evidence, the unaltered version of the audio tape recording of the new trial hearing, an evidentiary hearing for that purpose would be most appropriate.

8. The court, in denying an evidentiary hearing on the petition, prevented petitioner from presenting the findings of a forensic audio expert that the audio tape, submitted to defendant by the appellate court, contains irregularities and anomalies indicative of intentional tampering. The forensic audio expert retained by petitioner did, subsequent to the filing of the petition, make findings based upon an analysis of a duplicate of the audio tape presented to defendant by the appellate court; said expert, in his affidavit, offered his opinion that "there is . . . evidence of a difference on the audio tape which is not consistent with a real time recording." One anomaly noted by the forensic audio expert is located on the tape at a point corresponding with page four, line four of the new trial hearing transcript; in his affidavit, the forensic audio expert relates the basis for his above-noted opinion that the audio recording, submitted to defendant by the appellate court, could not have been the actual real time recording of the new trial hearing:

> . . . in the fourth complete line of text a statement presented by "The Court" there is the statement "I overrule your motion on that ground." What follows is a voice interjecting the statement "anything else?" If this audio tape were an exact replica, either a digital or analog recording of the original trial, the phrase "anything else" would not abut directly with the preceding word in this phrase.

The above initial indication is good cause for requiring submission and authentication in open court, of the audio tape in question; the court reporter should be required to produce the actual, original recording of the new trial hearing, which petitioner has not yet been allowed to review or present in any trial, appellate, or post-conviction proceedings to date, in violation of his right to due process under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The state courts to date have steadfastly refused to grant petitioner any fair opportunity for investigation, in an open court hearing, of the tampering indicated on the audio tape; the trial court abused its discretion in denying the petition without such an evidentiary hearing.

WHEREFORE, the above premises considered, the petitioner requests that this court reconsider its decision to deny the petition without a hearing, and further requests that, after such reconsideration, the court vacate its previous order, and allow discovery and depositions in preparation for a full evidentiary hearing on all grounds set out in the petition.

Respectfully submitted this Twelfth Day of June, 1998.

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

Case No. CR-97-1841

APPELLANT'S BRIEF ON APPEAL

July 23, 1998

## ISSUES PRESENTED

ISSUES (1): Whether trial court's denial of relief from conviction, without affording a hearing, on the basis of insufficiently specified preclusion grounds, violated petitioner's right to due process under the due process clause of the Fourteenth Amendment to the United States Constitution?

ISSUES (2): Whether the trial court improperly denied relief, as to the petition claim of failure to charge all requisite elements of the offense [arising under Rule 32.1(b), A.R.Cr.P.], in violation of petitioner's right, under the due process clause of the Fourteenth Amendment to the United States Constitution, to be adequately informed of the nature of the accusation?

ISSUES (3): Whether the trial court's denial of the petition claim of ineffective assistance of counsel, without a hearing, violates petitioner's right, to reasonably effective assistance of counsel, arising under the due process clause of the Fourteenth Amendment to the United States Constitution?

ISSUES (4): Whether trial court's denial of relief on the petition claims (of frustration of appellate assertions by the editing and alteration of an audio tape and denial of evidentiary presentation of same) deprive petitioner of rights thereto under the due process clause of the Fourteenth Amendment to the United States Constitution?

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

Case No. CR-97-1841

APPELLANT'S BRIEF ON REHEARING

September 25, 1998

## ISSUES PRESENTED

ISSUES (1): Whether trial court's denial of relief from conviction, without affording a hearing, on the basis of insufficiently specified preclusion grounds, violated petitioner's right to due process under the due process clause of the Fourteenth Amendment to the United States Constitution?

ISSUES (2): Whether the trial court improperly denied relief, as to the petition claim of failure to charge all requisite elements of the offense [arising under Rule 32.1(b), A.R.Cr.P.], in violation of petitioner's right, under the due process clause of the Fourteenth Amendment to the United States Constitution, to be adequately informed of the nature of the accusation?

ISSUES (3): Whether the trial court's denial of the petition claim of ineffective assistance of counsel, without a hearing, violates petitioner's right, to reasonably effective assistance of counsel, arising under the due process clause of the Fourteenth Amendment to the United States Constitution?

ISSUES (4): Whether trial court's denial of relief on the petition claims (of frustration of appellate assertions by the editing and alteration of an audio tape and denial of evidentiary presentation of same) deprive petitioner of rights thereto under the due process clause of the Fourteenth Amendment to the United States Constitution?

ISSUES (5): Whether Rule 32.2(c), A.R.Cr.P., bars a petition timely filed in accordance with § 1-1-4, Code of Alabama, 1975?

IN THE SUPREME COURT OF ALABAMA

Case No. 1980249

BRIEF IN SUPPORT OF PETITION

FOR WRIT OF CERTIORARI

November 6, 1998

## ISSUES PRESENTED

ISSUES (1): Whether the appellate court erred in affirming the trial court's denial of the post-conviction petition (in violation of petitioner's right to due process under the due process clause of the Fourteenth Amendment to the United States Constitution) on the following listed preclusion grounds, and whether the appellate court's decision is in conflict with the prior decisions also indicated as follows:

(a) as to each of the post-conviction petition grounds, the trial court adopted the prosecution's inadequately pleaded preclusion assertions--which lumped together mutually exclusive preclusion grounds [specified in A.R.Cr.P. Rules 32.2(a)(2), (3), (4), and (5)], in the conjunctive--and the appellate court's affirmance decision is in conflict with prior decisions of the Alabama Supreme Court on the same point of law;

(b) although Rule 32.2(c), as to post-conviction petition limitation periods, was neither asserted by the prosecution in the trial court, no cited in the trial court's order, the appellate court's decision affirmed the trial court judgment on that basis, and such decision is in conflict with prior decisions of the Alabama Supreme Court on the same point of law;

(c) the appellate court's decision on the above points, because it is so absolutely contrary to prior state precedent, amounts to an attempt to evade review of the federal questions presented in the trial court petition, and the appellate court decision is in conflict with prior decisions of the United States Supreme Court.

ISSUES (2): Whether the appellate court erred in affirming the trial court's denial of the post-conviction petition claim of violation of petitioner's right, under the due process clause of the Fourteenth Amendment to the United States Constitution, to be free from conviction upon a complaint which fails to charge all

requisite elements of the offense and whether the appellate court's decision is in conflict with prior decisions of the United States Supreme Court on the same point of law.

ISSUES (3): Whether the appellate court erred in affirming the trial court's denial, without a hearing, of the post-conviction petition claim of violation of petitioner's right, under the due process clause of the Fourteenth Amendment to the United States Constitution, to the reasonably effective assistance of counsel, and whether the appellate court decision is in conflict with prior decisions of both the United States Supreme Court, and the Alabama Supreme Court, on the same points of law.

ISSUES (4): Whether the appellate court erred in affirming the trial court's denial, without a hearing, of the post-conviction petition claim of violation of petitioner's rights, under the due process clause of the Fourteenth Amendment to the United States Constitution, (a) to be free from the frustration of his attempts to assert claims (on the main appeal from his conviction) due to the editing and alteration of an audio tape made the subject of record correction proceedings, and (b) to an opportunity for an evidentiary hearing for the purpose of presenting the original unedited audio tape as a means of correcting the appellate record; this issue further contemplates whether the appellate court's decision is in conflict with prior decisions of the United States Supreme Court on the same point of law.

IN THE SUPREME COURT OF ALABAMA

Case No. 1980249

PETITION FOR WRIT OF CERTIORARI

November 6, 1998

GROUNDS

1. The basis of this petition for the writ is that the appellate court decision is in conflict with a prior decision of the Alabama Supreme Court on the same point of law. The appellate court decision affirmed the trial court's preclusion ruling adopting the prosecution's inadequately pleaded preclusion assertions [i.e. mere citation, in the conjunctive, of mutually exclusive provisions of A.R.Cr.P. Rules 32.2(a)(2), (3), (4), and (5), as to each of the claims asserted in the post-conviction petition]. In the case of *Ex parte Rice*, 565 So.2d 606, 608 (Ala. 1990), the Alabama Supreme Court held that ". . . [a] general allegation that merely refers the petitioner and the trial court to the Rule does not provide the type of notice necessary to satisfy the requirements of due process and does not meet the burden of pleading assigned to the State by Rule [32.3]." The decision of the appellate court is in conflict with the holding of the Alabama Supreme Court and the appellate court erred in failing to follow that holding.

2. The basis of this petition for the writ is that the appellate court decision is in conflict with a prior decision of the Alabama Supreme Court on the same point of law. The appellate court decision affirmed the trial court judgment on the basis that the trial court petition, which was filed on a Monday (April 20, 1998), was barred by the limitations provisions of Rule 32.2(c), A.R.Cr.P. since the two-year anniversary of the issuance of the Certificate of Judgment fell on a Sunday (April 19, 1998). The Alabama Supreme Court, construing the provisions of § 1-1-4, Code of Alabama, 1975, held, in the case of *Timberlake v. Grand Lodge, Knights of Pythias*, 99 So.2d 429 (Ala. 1957), that "the day of the act, event of default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a legal holiday." The appellate court's decision is in conflict with the holding of the Alabama

Supreme Court and the appellate court erred in failing to follow that holding.

3. The basis of this petition for the writ is that the appellate court decision is in conflict with a prior decision of the United States Supreme Court on the same point of law. The appellate court decision affirmed the trial court's preclusion rulings, as laid out in the two grounds listed hereinabove, upon legal theories which are novel and contrary to well-settled state legal precedents; these novel preclusion decisions had the effect of thwarting petitioner's federal constitutional claims as asserted in the trial court post-conviction petition. The United States Supreme Court, in the case of *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 457-458 (1958), held that "[n]ovelty in procedural requirements cannot be permitted to thwart review in this court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." The decision of the appellate court is in conflict with the holding of the United States Supreme Court and the appellate court erred in failing to follow that holding.

4. The basis of this petition for the writ is that the appellate court decision is in conflict with a prior decision of the United States Supreme Court on the same point of law. The appellate court decision affirmed the trial court's denial of the post-conviction petition claim of failure of the complaint to state all requisite elements of the offense; the offense alleged in the complaint was trespassing, in a store open to the public, under the provisions of § 13A-7-4, Code of Alabama, 1975. The post-conviction petition asserted that the provisions of § 13A-7-1(4), Code of Alabama, 1975, operated so as to exclude petitioner's alleged conduct from the prohibition of the statute unless, as a necessary ingredient of the offense, there was defiance of a lawful order, not to enter or remain, communicated to the accused by some person authorized to give such an order; the complaint failed to allege the identity or character of any person authorized to give such an order. The appellate court affirmed the denial of this claim on the premise that the complaint was sufficient even in absence of any allegation, as to identity or character, of any such "authorized" person, in such complaint. The United States Supreme Court, in the case of *Russell v. United States*, 369 U.S. 749, 763 (1962), held that one criterion of a sufficient accusation

is that it "contains the elements of the offense intended to be charged," and further held, *Id.*, at 765, that "it is not sufficient to set forth the offence in the words of the statute, unless those words . . . . set forth all the elements necessary to constitute the offence intended to be punished . . ." The decision of the appellate court is in conflict with the holding of the United States Supreme Court and the appellate court erred in failing to follow that holding.

5. The basis of this petition for the writ is that the appellate court decision is in conflict with prior decisions of both the United States Supreme Court and the Alabama Supreme Court. The appellate court decision affirmed the trial court's denial of the post-conviction petition claim of ineffective assistance of counsel. Trial defense counsel failed to object to the presumptively prejudicial, unauthorized entry of the bailiff into the jury room during deliberations (this failure to object prompted the appeals court, on the appeal of the conviction, to reject the defendant's claim regarding the bailiff's unauthorized entry); further, trial defense counsel, between the time of trial and the time of filing of the new trial motion, wholly failed to respond to defendant's repeated requests for her account of the aforesaid trial events, making it impossible to assert the ineffectiveness of counsel claim in the new trial motion. The appellate court decision affirmed, also, the trial court's denial of a hearing on the ineffectiveness of counsel claim.

The United States Supreme Court, in the case of *Strickland v. Washington*, 466 U.S. 668, 686 (1984), held that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." In the same case, *Id.*, at 687, identified two components of ineffectiveness: deficient performance and resultant prejudice; the Court also identified, *Id.*, at 688, a "more particular duty to consult with the defendant . . . . and to keep the defendant informed . . ." Under the unrefuted facts contained in the post-conviction petition, the appellate court decision in the instant case is in conflict with the holding of the United States Supreme Court and the appellate court erred in failing to follow that holding.

Further, as to the appellate court's affirmance of the trial court's denial of a hearing on the ineffectiveness claim, the

Alabama Supreme Court, in *Ex parte Boatwright*, 471 So:2d 1257, 1258 (Ala. 1985) held that "an evidentiary hearing must be held on a coram nobis petition . . . . which contains matters and allegations (such as ineffective assistance of counsel) which, if true entitle the petitioner to relief." The appellate court decision is in conflict with the holding of the Alabama Supreme Court and the appellate court erred in failing to follow that holding.

6. The basis of this petition for the writ is that the appellate court decision is in conflict with prior decisions of the United States Supreme Court. The appellate court decision affirming the trial court's denial of the post-conviction petition claim (of editing and alteration of an audio tape--made the subject of record correction proceedings--and denial to defendant of any opportunity to examine the original, unedited version of the audio tape) is in conflict with a prior decision of the United States Supreme Court, in *Chessman v. Teets*, 350 U.S. 3, 3-4 (1955), holding that "charges of fraud as such set forth a denial of due process of law in violation of the Fourteenth Amendment," in speaking of unrefuted allegations of intentional alteration of appellate record materials.

Further, the appellate court decision affirming the trial court's denial of a hearing on this claim, is in conflict with the holding of the United States Supreme Court in *Chessman v. Teets*, 354 U.S. 156, 164 (1956), that "consistently with procedural due process, . . . affirmance of petitioner's conviction upon a seriously disputed record, whose accuracy petitioner has had no voice in determining, cannot be allowed to stand."

The appellate court decision is in conflict with the above two holdings of the United States Supreme Court and the appellate court erred in failing to follow those holdings.

Rule 32.2(a), Ala.R.Cr.Proc.

(a) Preclusion of Grounds. A petitioner will not be given relief under this rule based upon any ground:

(1) Which may still be raised on direct appeal under the Alabama Rules of Appellate Procedure or by post-trial motion under Rule 24; or

(2) Which was raised or addressed at trial; or

(3) Which could have been but was not raised at trial, unless the ground for relief arises under Rule 32.1(b); or

(4) Which was raised or addressed on appeal or in any previous collateral proceeding; or

(5) Which could have been but was not raised on appeal, unless the ground for relief arises under Rule 32.1(b).

§ 1-1-4, Code of Ala. 1975

Time within which any act is provided by law to be done must be computed by excluding the first day and including the last. However, if the last day is Sunday, or a legal holiday as defined in section 1-3-8, or a day on which the office in which the act must be done shall close as permitted by any law of this state, the last day also must be excluded, and the next succeeding secular or working day shall be counted as the last day within which the act may be done.